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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALLEN KEITH JENKINS,

Defendant and Appellant.

B159605

(Los Angeles County
Super. Ct. No. SA039138)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elden S. Fox, Judge. Affirmed.

Christine C. Shaver, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jeffrey B. Kahan and Louis W. Karlin, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Allen Keith Jenkins appeals from the judgment entered following a jury trial that resulted in his convictions for three counts of false imprisonment by violence or menace, seven counts of second degree robbery, conspiracy to commit second degree robbery, and conspiracy to commit false imprisonment. Jenkins was sentenced to a total term of 22 years, four months, in state prison.

Jenkins contends (1) the trial court abused its discretion by admitting evidence of a co-defendant's gang affiliation; (2) the trial court erred by denying his motion for a mistrial; (3) instruction with CALJIC No. 17.41.1 violated his constitutional rights; (4) the prosecutor committed prejudicial misconduct; and (5) the trial court abused its discretion by denying his motion to strike his prior conviction allegation.¹ We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts.

Viewed in accordance with the usual rules of appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), the evidence established that Jenkins aided and abetted the May 24, 2000 robbery of the XIV Karats jewelry store located on South Beverly Drive in Beverly Hills.

Jenkins had been a XIV Karats security guard from approximately August 1998 to January 2000. Jenkins's sister, Lynn, worked at XIV Karats at the time of the robbery. She had called in sick the morning of May 24.²

On the morning of the robbery, at approximately 8:30 a.m., XIV Karats manager and co-owner Ronald Rosenblum unlocked the premises, disarmed the alarm systems,

¹ Jenkins joins in "all issues raised in the Opening Brief by co-appellants that may accrue to his benefit" pursuant to California Rules of Court, rule 13. We therefore address herein, but find no merit to, the contentions of prosecutorial misconduct and instructional error raised in the related appeal of Jenkins's co-defendant Glenn Anthony Davis. The other contentions raised by Davis and co-defendant Terrell C. Wright are fact-specific to Wright's and Davis's appeals and are not pertinent here.

² Jenkins's sister, who was called by the defense, testified that she was pregnant in May 2000 and was suffering from morning sickness. Hayes testified that Lynn was a very punctual and good employee who did not chronically miss work. She was still working at the store at the time of trial.

and unlocked the vault and safes located inside. Employees Jamie Hayes, Daryn Duff, Kolet Itach, Irma Morales, and Jose Montiel prepared for business in the store. Security guards Charles Wolsic and Melvin Grace remained downstairs in the lobby.

On his way into XIV Karats, Grace noticed co-defendants Terrell C. Wright and Glenn Anthony Davis as they passed him on the sidewalk. Wright was wearing a red shirt with a tropical or Hawaiian print. As Grace and Wolsic waited in the lobby, Davis and Wright entered the building. Wright pulled a semiautomatic handgun from his shirt and said, "Okay. This is the jack." Wright and Davis were joined by two other robbers. The robbers bound the guards with duct tape and placed them in the elevator. When Hayes entered the lobby to investigate why the elevator was not responding, he, too, was bound and placed in the elevator. When the elevator doors opened on the second floor, the robbers encountered and bound Rosenblum. They forced him, as well as the guards and Hayes, to lie face down on the floor in front of the elevator.

On Wright's order, one of the robbers went to the room where the store's surveillance cameras were kept. After Wright forced Hayes to assist, the robber removed the store's surveillance videotapes. A second robber went toward the vault, located at the other end of the jewelry showroom. Wright and Davis accosted Morales and pointed their guns at her while she was placing jewelry in a showroom display case. Davis forced her, at gunpoint, to lie on the floor of a nearby office. Wright, meanwhile, accosted Itach and Duff and forced them, also at gunpoint, to lie on the floor of the office with Morales.

During the robbery, Wright used a walkie talkie to communicate with a person outside the building. The voice on the walkie talkie made comments and gave instructions that suggested familiarity with XIV Karats's personnel, premises and procedures. Wright asked XIV Karats employees for the key to the "middle safe," the only safe used to hold cash and loose diamonds. He also asked for the man who drove "the Black Mercedes Benz." Rosenblum drove such a vehicle and was the only one at the store with a key to the "middle safe."

Security guard Dennis Edinbyrd arrived on the scene. After observing a video monitor showing events inside the store, Edinbyrd concluded that a robbery was in

progress, pressed an alarm button, telephoned 9-1-1, and ordered other employees who had arrived out of the lobby. Edinbyrd saw one of the robbers exit the stairwell, enter a blue Chevrolet Celebrity parked on South Beverly Drive, start the car, and wait. Two more men ran from the stairwell, followed by two others. The car then drove away, carrying a total of five men. Edinbyrd had worked with Jenkins, and testified that Jenkins was not one of the men in the car.

The robbers fled with jewelry valued at approximately \$750,000.

Davis's palm print was discovered on one of the jewelry showcases. Wright's right thumb print was discovered on a jewelry tray in the store's vault area. He was arrested approximately two weeks after the robbery, carrying \$1,788 and a key to a room at the Why Tell Motel. A search of that room revealed a .9-millimeter handgun and a red Hawaiian shirt.

Evidence presented by the People suggested co-defendant Livingston had purchased the getaway vehicle approximately one week before the robbery. A search of Livingston's residence revealed over 200 pieces of jewelry with XIV Karats tags still attached, as well as approximately \$7,400 in cash.

A XIV Karats surveillance videotape that depicted the store's opening procedures was found in Jenkins's residence, as well as photographs depicting XIV Karats's employees and the lobby, elevator, jewelry showroom, and guard booths. While intoxicated, Jenkins had informed his ex-girlfriend, Tameka Thomas, that he had had "something to do" with the XIV Karats robbery. Thomas also testified that Jenkins possessed a walkie talkie or similar device. Telephone records established that during May 2000, over 20 calls were made from a cellular telephone used by Livingston to Jenkins's pager, including during the week before the robbery. On the morning of the robbery, calls were placed to Jenkins's pager from the cellular telephone used by Livingston at 6:56 a.m. and 10:40 a.m. Jenkins's telephone records also showed telephone calls to a Fresno number on May 12, 2000. The same Fresno number had been called numerous times, including six times on the day after the robbery, May 25, from the phone used by Livingston. Davis was arrested in Fresno on July 25, 2000. When

interviewed by police after the crimes, Jenkins denied knowing Livingston, Davis, and Wright, and denied participating in the crimes.

2. Procedure.

Trial was by jury. Jenkins was convicted of three counts of false imprisonment by violence or menace (Pen. Code, § 236),³ lesser included offenses of kidnapping to commit robbery; seven counts of second degree robbery (§ 211); conspiracy to commit second degree robbery (§ 182, subd. (a)(1)); and conspiracy to commit false imprisonment. The jury found true allegations that a principal was armed with a firearm during commission of the offenses (§ 12022, subd. (a)(1)), and that the offenses involved the theft of over \$100,000. Jenkins admitted suffering a prior “strike” conviction for oral copulation with a person under 14 years of age (§ 288a(c)), a serious felony (§ 667, subd. (a), § 1170.12, subds. (a) – (d), 667, subds. (b) – (i)). The trial court denied Jenkins’s motions for a new trial and to strike the prior conviction allegation and sentenced him to a total term of 22 years, four months in prison. It also imposed restitution and parole revocation fines. Jenkins appeals.

DISCUSSION

1. The trial court did not err by allowing the admission of gang evidence.

a. Additional facts.

Prior to trial, the trial court made a preliminary ruling excluding evidence of the defendants’ gang affiliations after the prosecutor represented she did not intend to present such evidence.

The People presented evidence that co-defendant Trayveon Livingston purchased the robbers’ getaway vehicle, a Chevrolet Celebrity, approximately one week before the crimes, from Carlos Romo. Romo testified that a “black guy” named “Tray,” who drove a red Impala with the license plate “1 DUBBZ,” purchased the Celebrity from him. To complete the sale of the car, Romo followed Tray to a house at 2411 Budlong Avenue, which was established as Livingston’s residence through other evidence.

³ All further undesignated statutory references are to the Penal Code.

Before trial, Romo had unequivocally identified Livingston as the purchaser of the Celebrity from a six-pack photographic lineup, but had refused to sign anything evidencing the identification. At trial, Romo testified that he did not recognize any of the persons in the photographic lineup and denied that the person to whom he sold the car was in the courtroom. Romo admitted he had told the prosecutor and a detective that “people in the neighborhood” had threatened him with harm if he testified, but claimed he falsely made such statements because he did not wish to testify.

At a sidebar conference, the prosecutor represented that Romo had previously stated he knew Livingston and was afraid of him because he was a Rolling Twenties Blood gang member. The trial court denied the prosecutor’s request to elicit this testimony from Romo.

During direct examination, Detective Thomas Linehan testified that Romo had identified Livingston in the photographic lineup, but would not sign a form evidencing the identification because “[h]e was afraid to . . . He didn’t want to go to court.” During cross-examination, Livingston’s counsel elicited from Linehan an admission that the police report did not state that Romo said he was afraid to testify. At a sidebar conference, the prosecutor explained that the police report contained a statement that Romo knew Livingston was a Blood gang member. The trial court reviewed the relevant portion of the police report and agreed that the information contained therein could give rise to an implication that Romo was afraid of retribution due to Livingston’s perceived gang membership. The trial court nonetheless directed the prosecutor to avoid mention of the gang affiliation, but allowed her to ask Linehan whether the police report referenced Romo’s concerns about safety.

During his case, Livingston presented evidence through his aunt, Etoria Munford, and his girlfriend, Adriana Velarde, suggesting that his friend Peter Kelly was known as Tray-K, sometimes drove Livingston’s Impala, and often stayed at or visited the Budlong Avenue house.

After another sidebar conference, the trial court allowed the prosecutor to question Munford regarding Livingston’s gang membership. In an attempt to elicit such

testimony, the prosecutor asked whether Livingston was a gang member, whether the Budlong house was a gang “hangout,” whether Kelly was a member of the same gang, whether Livingston was especially proud of his Impala because of its red color, whether Livingston and others were wearing gang attire in a photograph, and whether Livingston had told Munford that he was involved in the XIV Karats robbery to help the gang. However, Munford repeatedly denied that Livingston was a gang member. Munford admitted that in one photograph, Livingston appeared to be “flashing” a gang sign, and that she “might have had a suspicion” that he was a gang member, but “did not know that.”

During the People’s rebuttal case Detective Linehan testified that when Romo selected Livingston’s photograph, Romo stated he was afraid of Livingston because Livingston was a Rolling Twenties Blood gang member. Romo, who was afraid for his life, did not wish to testify or sign forms identifying Livingston because he was afraid of gang reprisals.

The defendants moved for a mistrial on the ground prejudicial gang evidence had been improperly admitted. The trial court denied the motion. It explained that Livingston had attempted to show Kelly was actually the purchaser of the car, and Romo had misidentified him. The trial court opined, “That issue in regard to Mr. Romo’s testimony, I believe, is rather critical, and I believe the people were entitled at that point in time to explain his lack of identification if, in fact, it was based on his belief and some affiliation or association.” It concluded that the questioning regarding gang affiliation had been properly limited to Livingston on the issue of misidentification, minimizing the possibility of prejudice.

The trial court instructed the jury that the evidence of gang affiliation was admitted solely against Livingston, and not the other defendants.⁴ It further instructed:

⁴ The trial court instructed, “Evidence has been admitted against defendant Trayveon Livingston regarding alleged gang affiliation, and not admitted against the others. [¶] You are instructed that this evidence can not be considered by you against the other defendants. [¶] Do not consider this evidence against the other defendants.”

“Certain evidence regarding alleged gang affiliation was admitted for a limited purpose. [¶] This evidence was admitted for the purpose of explaining the facts and circumstances surrounding the identification or lack of identification of defendant Trayveon Livingston by witness Carlos Romo. Such evidence is not to be considered by you for the truth of that statement and is not to be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted.”

b. *Discussion.*

Jenkins argues the trial court improperly admitted gang evidence and erroneously denied defendants’ motion for a mistrial. He urges that the gang evidence had only slight probative value, but was highly inflammatory. We disagree.

Gang evidence is not admissible if introduced only to “show a defendant’s criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense. [Citations.]” (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449; cf. *People v. Jordan* (2003) 108 Cal.App.4th 349, 365.) However, such evidence is admissible if it is relevant to issues in the case, is not more prejudicial than probative, and is not cumulative. (Evid. Code, §§ 352, 210, 780; *People v. Ruiz* (1998) 62 Cal.App.4th 234, 240.) Even if gang evidence is relevant, it may have a highly inflammatory impact on the jury. Thus, “trial courts should carefully scrutinize such evidence before admitting it. [Citation.]” (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Gurule* (2002) 28 Cal.4th 557, 653.)

A trial court’s admission of evidence, including evidence related to a defendant’s gang membership, is reviewed for abuse of discretion. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1519.) “The admission of gang evidence over an Evidence Code section 352 objection will not be disturbed on appeal unless the trial court’s decision exceeds the bounds of reason.” (*People v. Olguin, supra*, 31 Cal.App.4th at p. 1369.)

We conclude the trial court did not abuse its discretion. First, the trial court allowed limited gang evidence for a legitimate purpose: to show the basis for Romo's fear and refusal to identify Livingston. (*People v. Sanchez, supra*, 58 Cal.App.4th at pp. 1449-1450; *People v. Olguin, supra*, 31 Cal.App.4th at p. 1368.) Livingston's perceived gang membership was directly related to an important issue in the case: the accuracy of Romo's pretrial identification of Livingston as the man who purchased the getaway car. Contrary to Jenkins's argument, the fact that Linehan was permitted to testify that his police report reflected Romo's concerns about safety did not negate the need for evidence of Livingston's gang affiliation. Whether there was a legitimate reason for Romo's purported fear was crucial to a fair evaluation of his testimony.

Nor did the trial court justify admission of the evidence on a flawed theory that the defense had "opened the door" to such evidence. *People v. Johnson* (1964) 229 Cal.App.2d 162, 169-170, is of no help to Jenkins. There, the court stated, " '[T]he argument that appellant's counsel 'opened the gates' is unavailing. . . . 'An error that is prejudicial is no less so because it results from a lack of knowledge on the part of either counsel or both. Legitimate cross-examination does not extend to matters improperly admitted on direct examination. Failure to object to improper questions on direct examination may not be taken advantage of on cross-examination to elicit immaterial or irrelevant testimony. The so-called 'open the gates' argument is a popular fallacy. 'Questions designed to elicit testimony which is irrelevant to any issue in the case on trial should be excluded by the judge, even though opposing counsel has been allowed, without objection, to introduce evidence upon the subject.' " (*Id.* at pp. 169-170; see also *People v. Wells* (1949) 33 Cal.2d 330, 340, disapproved on other grounds in *People v. Wetmore* (1978) 22 Cal.3d 318, 321; *People v. Parrella* (1958) 158 Cal.App.2d 140, 147; *People v. Gambos* (1970) 5 Cal.App.3d 187, 192 ["By allowing objectionable evidence to go in without objection, the non-objecting party gains no right to the admission of related or additional otherwise inadmissible testimony."].)

These authorities do not support the conclusion that the prosecutor's cross-examination of Munford or the admission of Linehan's testimony was error. The

prosecutor did not fail to object to improper testimony and then attempt to benefit from that omission by herself attempting to elicit impermissible testimony; instead, she attempted to rebut defendant Livingston's properly admitted evidence. As the People point out, "[t]his [was] not a case where the court allowed one party to introduce inadmissible evidence in response to the other party's questionable line of questioning." (Cf. *People v. Steele* (2002) 27 Cal.4th 1230, 1248-1249.)

After Livingston offered evidence suggesting that Romo might have sold the car to Kelly, evidence explaining Romo's failure to identify Livingston in court became more probative. As the probative value of evidence of Livingston's gang affiliation increased, the trial court properly reweighed the probative value of the evidence against its prejudicial effect. (*People v. Jordan, supra*, 108 Cal.App.4th at pp. 365-366 [trial court, which had initially excluded gang evidence, properly allowed the People to elicit gang evidence on rebuttal, where such evidence became relevant to rebut inferences raised during defendant's portion of the case].) A trial court may properly "conclude the probative value of the gang evidence increased during presentation of the trial to the point where it outweighed the risk of undue prejudice." (*People v. Jordan, supra*, 108 Cal.App.4th at p. 366.) Here, the trial court's comments indicate it properly balanced the prejudicial effect of the evidence against its probative value.

Second, even assuming arguendo that the trial court erred, any such error was harmless. We evaluate the erroneous admission of gang evidence under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836, and reverse only if it is reasonably probable that admission of the evidence affected the verdict. (*People v. Champion* (1995) 9 Cal.4th 879, 923; *People v. Jordan, supra*, 108 Cal.App.4th at p. 366; *People v. Malone* (1988) 47 Cal.3d 1, 22; *People v. Felix* (1993) 14 Cal.App.4th 997, 1007-1008.) The evidence actually admitted was minimal, i.e., that Romo was afraid to identify Livingston because he believed Livingston to be a gang member. The jury was explicitly advised that the evidence was not offered for its truth. It was also instructed that the evidence could be considered against Livingston only, a principle that was

reiterated in the prosecutor's closing argument.⁵ We presume jurors follow the trial court's instructions. (*People v. Waidla* (2000) 22 Cal.4th 690, 725; *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17 ["The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions."]); *People v. Williams* (2000) 79 Cal.App.4th 1157, 1171.)

There was no direct evidence that the other defendants were gang members. Evidence that Wright visited Livingston's Budlong Avenue house did not establish that Wright or Jenkins were gang members. The jury was instructed not to assume true any insinuation suggested by a question posed to a witness. (CALJIC No. 1.02.) There is no reasonable likelihood that jurors assumed Jenkins was a gang member, or improperly used that inference to infer guilt.

The case against Jenkins was strong. The evidence that the robbers had assistance from an inside source was overwhelming; only an inside source would have possessed information known to the robbers, such as the number of surveillance videotapes, the existence of the safe used to store cash, and the type of vehicle driven by the only person who possessed a key to that safe. Jenkins told police that he did not know Livingston, but telephone records suggested this was false. These facts, coupled with the timing of the telephone calls/pages between Jenkins, Livingston and Davis, and Jenkins's possession of the videotape showing XIV Karat's opening procedures, were strong evidence of Jenkins's guilt. The gang evidence, in contrast, was minimal and limited.

Additionally, the jury's acquittal of Livingston on several counts, and its inability to reach a verdict on other counts charged against Livingston, is powerful evidence the jury was *not* prejudiced by the limited evidence of Livingston's gang affiliation. Given that the jury clearly did not use evidence of Romo's belief about Livingston's gang affiliation to convict Livingston, there can be no question the evidence was not

⁵ The prosecutor argued, "That's why the gang stuff is important. It's important because it shows you what Mr. Romo's state of mind was. And by the way, that's the only reason for which you are allowed to consider the gang evidence and it's only allowed to be considered against Mr. Livingston."

prejudicial in regard to the remaining defendants. Therefore, it is not reasonably probable that a more favorable verdict for Jenkins would have resulted had the challenged evidence and questioning been omitted.

Because the trial court properly admitted the challenged evidence and there was no prejudice to Jenkins in any event, we necessarily conclude the trial court did not abuse its discretion by denying Jenkins's motion for a new trial. (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284 [mistrial motion should be granted only when moving party's chances of receiving a fair trial have been irreparably damaged]; *People v. Cox* (2003) 30 Cal.4th 916, 953 [whether a particular incident is incurably prejudicial is left to sound discretion of the trial court].)

2. *The prosecutor did not commit prejudicial misconduct.*

a. *Additional facts.*

During closing argument, counsel for Livingston pointed out that the prosecutor had questioned Munford about Livingston's gang affiliation, and opined that the prosecutor had attempted to establish Livingston was cheating on his girlfriend. Defense counsel argued, "[T]he prosecution spent time on these two issues, and the reason why they did it is because the prosecutor, herself, does not believe the evidence against my client is so overwhelming. In fact, I will argue -- " The prosecutor interposed an objection, which was overruled. Defense counsel continued by arguing that the evidence against Livingston did not amount to proof beyond a reasonable doubt.

In her closing argument, the prosecutor rebutted defense counsel's remarks as follows: "Now, Mr. Dudley [Livingston's counsel] attacked me personally yesterday to some extent, and so I would like to address the two issues that he raised. First of all, he said, 'the prosecutor doesn't even think that my guy's guilty.' I don't know what planet he got that from. I believe he's really out there. [¶] This case is clear. The evidence shows beyond a reasonable doubt that all these defendants are guilty, and I believe it or I wouldn't be here." Defense counsel did not object. The prosecutor continued by discussing the evidence.

b. *Discussion.*

Jenkins joins in co-defendant Davis's contention that the prosecutor committed prejudicial misconduct "by personally vouching for the appropriateness of guilty verdicts." We disagree.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) "We apply a 'reasonable likelihood' standard for reviewing prosecutorial remarks, inquiring whether there is a reasonable likelihood that the jurors misconstrued or misapplied the words in question." (*People v. Roybal* (1998) 19 Cal.4th 481, 514.) We " 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 970; *People v. Gurule, supra*, 28 Cal.4th at p. 657.) The allegedly improper remarks must be viewed in the context of the closing argument as a whole. (*People v. Lucas* (1995) 12 Cal.4th 415, 475.)

Jenkins has waived this contention by failing to object to the prosecutor's comment at trial. It is well established that to preserve a claim of prosecutorial error for appeal, " ' "the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct." ' [Citations.]" (*People v. Barnett, supra*, 17 Cal.4th at p. 1133; *People v. Hughes* (2002) 27 Cal.4th 287, 392; *People v. Cunningham* (2001) 25 Cal.4th 926, 1000.) This was not the sort of extreme case in which an admonition would have been futile. (*People v. Riel* (2000) 22 Cal.4th 1153, 1212-1213.)

In any event, the contention fails on the merits. There was no pattern of egregious behavior that infected the trial with unfairness, nor did the prosecutor's brief remark involve deceptive or reprehensible methods. A prosecutor may not personally vouch for

the appropriateness of the verdict he or she urges. (*People v. Ayala* (2000) 24 Cal.4th 243, 288.) “[I]t is misconduct for a prosecutor to express a personal belief in the defendant’s guilt if there is a substantial danger that the jurors will construe the statement as meaning that the belief is based on information or evidence outside the trial record [citation], but expressions of belief in the defendant’s guilt are not improper if the prosecutor makes clear that the belief is based on the evidence before the jury [citation].” (*People v. Mayfield* (1997) 14 Cal.4th 668, 781-782.) However, the prosecutor did not engage in improper vouching here. Viewed in context, the prosecutor’s remark would have been understood by the jury as merely her opinion *based on the evidence adduced at trial*. Because the prosecutor referenced the evidence presented at trial in virtually the same sentence in which she stated her opinion, there was no danger jurors would have construed her argument to mean her views were based upon information or evidence outside the trial record.

Finally, even assuming that the prosecutor’s remark was improper, we may not reverse unless it is reasonably probable that a result more favorable to the defendant would have been obtained in the absence of the misconduct. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130; *People v. Barnett, supra*, 17 Cal.4th at p. 1133.) As noted above, the evidence against Jenkins was strong. In contrast, the prosecutor’s reference was brief. (*People v. Kipp, supra*, at p. 1130.) Moreover, as the United States Supreme Court has noted, when determining whether a prosecutor’s improper comment warrants reversal, “the reviewing court must not only weigh the impact of the prosecutor’s remarks, but must also take into account defense counsel’s opening salvo. Thus the import of the evaluation has been that if the prosecutor’s remarks were ‘invited,’ and did no more than respond substantially in order to ‘right the scale,’ such comments would not warrant reversing a conviction.” (*United States v. Young* (1985) 470 U.S. 1, 12-13.) Here, the prosecutor’s comment was restrained and offered solely to rebut defense counsel’s comments. As the Supreme Court found in *Young*: “Although it was improper for the prosecutor to express his personal opinion about respondent’s guilt, [citations], when viewed in context, the prosecutor’s remarks cannot be read as implying that the

prosecutor had access to evidence outside the record. The jury surely understood the comment for what it was – a defense of [the prosecutor’s] decision and his integrity – in bringing criminal charges on the basis of the very evidence the jury had heard during the trial.” (*United States v. Young, supra*, at p. 19.)

3. *The trial court did not prejudicially err by instructing with CALJIC No. 17.41.1.*

Jenkins joins in co-defendant Davis’s contention that the trial court erred by instructing the jury with CALJIC No. 17.41.1.⁶ He asserts that CALJIC No. 17.41.1 violated his right to a jury trial, interfered with the jury’s power to engage in nullification, chilled freedom of expression during deliberations, and allowed majority jurors to pressure holdout jurors. He urges that use of the instruction amounted to a structural defect in the proceedings, requiring per se reversal.

This claim is meritless. The California Supreme Court held in *People v. Engelman* (2002) 28 Cal.4th 436, that CALJIC No. 17.41.1 “does not infringe upon defendant’s federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict” (*Id.* at pp. 439-440.) The court decided that because the instruction could be misunderstood or misused, it is “inadvisable and unnecessary” for trial courts to give it in the future. (*Id.* at p. 445.) Because the jury is duty-bound to follow the trial court’s instructions and lacks the right to engage in nullification, the instruction, while inadvisable, does not violate a defendant’s constitutional rights. (*Id.* at p. 441.) Accordingly, while trial courts should not give this instruction in the future, we conclude there was no prejudicial error in the instant case.

4. *The trial court properly denied Jenkins’s motion to strike a prior conviction allegation.*

⁶ That instruction, as provided to the jury, read: “The integrity of a trial requires that jurors at all times during their deliberations conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.”

Jenkins admitted suffering a 1992 conviction for oral copulation with a person under fourteen years of age (§ 288a(c)). At sentencing, Jenkins moved to dismiss the prior conviction allegation under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. As relevant here, in his written motion Jenkins argued that striking the prior was proper because (1) he committed the prior offense when he was a minor; (2) the prior crime occurred nearly 10 years before the instant offense; (3) after his release from custody, he found a job and moved away from his former neighborhood; (4) the current offense occurred only four months before his parole was due to end; and (5) there was no direct evidence that he participated in the XIV Karats robbery, he did not use a gun, and he was not present at the scene.

The trial court indicated it had reviewed a probation and sentence report, Jenkins's motion and the People's responsive brief, and sentencing memoranda related to the other co-defendants in the case. The trial court pointed out that Jenkins had been on parole at the time the crimes were committed. It explained, "It's been the court's philosophy in regard to the issues as to strikes that – in the past and also recently – that this court has been rather reluctant to dismiss a strike in which the defendant is on active probation and/or parole, indicating to the court that it is certainly recent in terms of vintage and, secondarily, having been convicted of new offenses while on probation or parole. It is not a situation which I believe the court has authority within its discretion of *Romero* to arbitrarily strike such a strike for that purpose. [¶] So I will indicate on the *Romero* motion, because of the active parole status in this matter, that the court does not believe it would be within its discretion. In fact, I believe it would be an abuse of discretion to strike that for purposes of sentencing, and therefore, that motion will be denied."

Jenkins argues that the trial court's comments demonstrate it failed to fully and fairly consider all the relevant criteria. He contends that the trial court's ruling was based upon the "court's general philosophy" rather than on "appellant's own history and personal circumstances." Jenkins further urges that his prior conviction was remote in time and committed when he was a juvenile; that he "is a young man who has the capacity to engage in gainful employment and be a good citizen"; and the evidence

against him was circumstantial. Therefore, he contends, the matter should be remanded so the trial court can reconsider whether to strike the prior conviction allegation. These contentions lack merit.

A trial court may exercise discretion to strike prior conviction allegations in furtherance of justice. (§ 1385, subd. (a); *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at pp. 529-530; *People v. Williams* (1998) 17 Cal.4th 148, 151.) However, a court's discretion to strike prior felony conviction allegations is limited. (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 530; *People v. McGlothin* (1998) 67 Cal.App.4th 468, 473.) A trial court must consider both the defendant's constitutional rights and society's interests. (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1433.) "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . or in reviewing such a ruling, the court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams*, *supra*, 17 Cal.4th at p. 161.)

We review the trial court's ruling for abuse of discretion. (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 530; *People v. Romero*, *supra*, 99 Cal.App.4th at p. 1434; *People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.) The burden is on the party attacking the sentence to establish that the sentencing decision was irrational or arbitrary. (*People v. Romero*, *supra*, 99 Cal.App.4th at p. 1434; *People v. Myers*, *supra*, at pp. 309-310.) "It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*People v. Myers*, *supra*, at p. 310; *People v. Romero*, *supra*, 99 Cal.App.4th at p. 1434.)

On the record before us, we discern no abuse of discretion. Contrary to Jenkins's assertion, the record suggests that the trial court considered Jenkins's character, prospects, and background, as well as the circumstances of the instant crime. The court had reviewed a probation report that detailed Jenkins's criminal record and Jenkins's motion, which addressed these issues. To the extent the trial court did not explicitly mention the facts of Jenkins's prior crime, his employment history, or the instant offense, the information was clearly before the court. We presume that the trial court considered all of the relevant factors in the absence of an affirmative record to the contrary. (*People v. Myers, supra*, 69 Cal.App.4th at p. 310.) While Jenkins postulates that the trial court's comments demonstrated it sentenced him based upon its general philosophy without reference to his particular circumstances, we do not read the court's comments in the manner suggested. The fact that the court focused its explanatory comments on a particular aspect of the appellant's situation does not mean that it considered only that factor. (*Ibid.*)

We cannot say the trial court's refusal to strike a prior conviction allegation was irrational or arbitrary. (*People v. Myers, supra*, 69 Cal.App.4th at pp. 309-310.) The jury found Jenkins conspired to commit and aided and abetted a dangerous armed robbery. While Jenkins's attempts to obtain employment and become a productive member of society were laudable, Jenkins squandered that opportunity by betraying the trust of his employer and co-workers and helping others subject them to a frightening and dangerous armed robbery during which jewelry worth approximately \$750,000 was stolen. Although his prior offense was committed when he was a juvenile, the prior crime was egregious. According to a 1992 probation report, Jenkins committed a violent sexual assault on a young girl, and then threatened her life. The fact that the prior crime was committed in 1992 does not significantly assist Jenkins; as the probation report points out, Jenkins has spent a substantial portion of his life in custody. Jenkins was still on parole when he committed the instant crimes. In short, nothing in record before us suggests that Jenkins fell outside the spirit of three strikes scheme. The trial court did not abuse its discretion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P.J.

CROSKEY, J.